IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1000 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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IBRAHIM ISMAIL BHATTI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR BC DAVE for Appellant(s) : 1,
MR KP RAWAL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 08/11/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant alongwith one Mahmadhanif Ismail Bhatti (his brother) came to be tried by Sessions Court, Kachchh at Bhuj in Sessions Case No.15 of 1993 for the offence of murder of Khatubai Ibrahim (wife of the appellant) allegedly committed by them on 31st October, 1992 around 5.00 p.m. at village Motareha of Bhuj taluka of Kachchh district. The appellants allegedly poured kerosene over the deceased and set her to fire. The deceased was taken to Civil Hospital, Bhuj on the next day i.e. on 01st November, 1992. However, intimation to police came to be sent on 3rd November, 1992 and offence came to be registered. The police recorded the F.I.R. of the deceased, got the dying declaration recorded and collected other evidence and having found sufficient evidence to connect the accused persons with the crime, filed chargesheet in the Court of Chief Judicial Magistrate, Bhuj who, in turn, committed the case to the Court of Sessions. Charge was framed at Exh.7 to which both the accused persons pleaded not guilty and claimed to be tried. Upon prosecution leading the evidence and upon the Trial Court considering the same, the Trial Court came to the conclusion that the prosecution was successful in proving the guilt of the appellant for the offence of murder of his wife Khatubai and, therefore, convicted him under Section 302 of I.P.C. and sentenced him to undergo imprisonment for life. The Trial Court also concluded that the prosecution was not able to prove the case against co-accused Mahmadhanif and, therefore, recorded his acquittal. Aggrieved by the

conviction, the appellant has preferred this appeal.

2. Learned advocate Mr. Dave appears for the appellant and learned APP Mr. Rawal appears for the respondent – State. The record and proceedings are before us.

3. We have heard learned advocate Mr. Dave and learned APP Mr. Rawal and have gone through the record and proceedings.

3.1 Learned advocate Mr. Dave for the appellant submitted that the conviction is founded mainly on the basis of dying declarations. The first dying declaration is in the form of F.I.R. recorded by the police and produced on record at Exh.51. The second dying declaration is recorded by the Executive Magistrate which is brought on record at Exh.19 and there are two oral dying declarations sought to be proved by the prosecution by examining Bai Ameena at Exh.42 and Salemamad at Exh.41.

3.2 Mr. Dave submitted that the dying declarations recorded by the Executive Magistrate cannot be relied upon for the reason that it is not recorded in the words of the deceased. The deceased spoke in 'Kachchhi' language but the Executive Magistrate has recorded the dying declaration in Gujarati language after translating it. The possibility of the translation being defective cannot be ruled out.

3.3 Mr. Dave submitted that the dying declaration before the Executive Magistrate also cannot be relied upon for the reason that the time of recording may not be the correct time. The doctor has said that the Executive Magistrate approached her for verification of the health status of the deceased at 1535 hours. Thereafter, she examined the patient and certified that the patient was conscious and was capable of giving dying declaration. The doctor has deposed further that she took about 15-20 minutes in assessing the ability of the deceased. If that is so, the dying declaration could have been recorded at 1550 or 1555 hours. Therefore, the time of recording the dying declaration by the Executive Magistrate is not correct.

3.4 Learned advocate Mr. Dave also submitted that the place of incident creates doubt. According to the F.I.R., the incident occurred in the shop whereas if the panchnama is seen, the incident appears to have occurred in the house and, therefore, the F.I.R. is not reliable and the investigation would be defective.

3.5 Mr. Dave also contended that the incident has occurred on 31st October, 1992 whereas the F.I.R. and the dying declaration are recorded on 3rd November, 1992. This delay has remained unexplained by the prosecution and, therefore, the case being concocted by the prosecution against the appellant

cannot be ruled out.

3.6 Mr. Dave also submitted that the whole aspect has been overlooked or ignored by the Trial Court. The prosecution case cannot be said to have been proved beyond reasonable doubt. Though the deceased was in hospital from 1st November, 1992, the police is intimated only on 3rd November, 1992 which would reflect heavily on the conduct of the doctor, staff of the hospital and police authorities. There cannot be an assurance that the investigation is honest and truthful and, therefore, the conviction is wrongly recorded. This court, therefore, may set aside the conviction by allowing the appeal.

4. Learned APP Mr. Rawal has opposed this appeal. According to him, minor discrepancies had occurred in the investigation. Unless the discrepancies go to the root of the prosecution, they cannot be treated as adverse. If the investigation was dishonest and was aimed at framing up the accused persons, the investigating agency or the prosecution would not have left the lacuna which are pointed out by the appellant. The very fact that the defects have remained as they were and are placed before the court may be treated as an honest attempt on the part of the prosecution to place the facts of the case before the Trial Court for adjudication.

4.1 Mr. Rawal submitted that 'Kachchhi' is a spoken language and it has no script of its own. The

Executive Magistrate who recorded the dying declaration is himself a 'Kachchhi' and has, therefore, translated the same in Gujarati. His proficiency in translating 'Kachchhi' into Gujarati has not been doubted or questioned by the defence. He has no reason to falsely implicate the accused. He is a Government servant and was performing his duty. He has taken all precautions before and after recording the dying declaration which clearly implicates the appellant. The dying declaration, therefore, may be accepted at face value, as has been done by the Trial Court.

4.2 Mr. Rawal submitted that it has come on record that the deceased was brought to hospital on 1st November, 1992. However, the first informant was informed for the first time on 3rd November, 1992. Mr. Rawal submitted that ordinarily in such medico-legal cases, even the hospital authorities would inform the police but how a lapse is committed is not known and is not brought on record but this lapse in investigation or lapse on part of the hospital authorities cannot affect the veracity of the dying declaration recorded by the Executive Magistrate. Mr. Rawal submitted that it transpires from the evidence that an entry was made which speaks about the deceased having sustained accidental burns but who gave this information has not been brought on record by the prosecution and this aspect is not challenged or questioned by the defence. The person who made the entry has not been examined as a witness

but this lapse again will not mitigate or abrogate the effect of dying declaration.

5. So far as timing aspects are concerned, learned APP submitted that it is true that dying declaration is recorded between 1535 to 1550 hours on 3rd November, 1992. It is also true that the doctor has admitted that the Executive Magistrate approached her at 1535 hours to verify the health status of the deceased. It is also true that the doctor has deposed that she examined the patient for about 15-20 minutes. Obviously, therefore, the timing would come into conflict with each other. Mr. Rawal submitted that this may not be viewed so seriously. The fact remains that the doctor has certified that the patient was conscious at the time when the dying declaration was recorded. There may be some mistake on the part of the doctor in registering the timing or there may even be some exaggeration on the part of the doctor. This tendency of the witnesses is not uncommon and has been recognised by the Supreme Court. Mr. Rawal submitted that in view of the decision rendered in **STATE OF U.P. vs. ANIL SINGH [AIR 1988 SC 1998]**, the witnesses tend to exaggerate a bit or to add some embroidery sometimes even out of fear of being branded as false witnesses. The witnesses also labor under an impression that when a question is asked, they are bound to reply and even if they do not remember, they blurt out a reply which occurs to them spontaneously. This is done only with a view to protect their own image before the court.

Mr. Rawal, therefore, submitted that the timing aspect may not, therefore, be viewed so seriously. He submitted that the Trial Court has considered all relevant aspects before recording conviction and, therefore, the appeal may be dismissed.

6. We have taken into consideration rival side contentions and have examined the evidence from their perspective.

7. The prosecution case hangs mainly on two oral dying declarations made before Bai Ameena (Exh.42) and witness Salemamad (Exh.41) besides the dying declaration in the form of F.I.R. before the police (Exh.51) and the dying declaration before the Executive Magistrate (Exh.19). According to the prosecution, oral dying declarations were made before two other witnesses namely Chandrikaben and Kasturben but they have not supported the prosecution case and have been declared hostile.

8. If we see the F.I.R. (Exh.51), we find that it is recorded on 3rd November, 1992 where the deceased states that she was married to the appellant about 5 months prior to the incident and on the date of the incident, she was fetching water when the appellant and his brother poured kerosene on her and put her to fire. She, therefore, ran out of the shop and the neighbours Chandrika, Punita and Meena extinguished the fire. After some time, her husband and Hanif took her to home. She stated that her

husband and her brother-in-law asked her to say that she sustained burns while preparing tea and on the next day, her brothers-in-law Gafoor and Anwar took her to Government Hospital in Bhuj in a taxi. She says that she was set to fire as she did not do household work and a pot was broken by her.

8.1 Bai Ameena in her deposition (Exh.42) says that she learnt that her daughter is brought to Bhuj Hospital and, therefore, she went to the hospital with her sisters-in-law. After meeting the deceased, she asked as to what had happened. The deceased told her that she is asked to say that she sustained burns while preparing tea but, in fact, she has been set to fire by her husband as the pot in which she was fetching water fell down and broke. The witness has been cross-examined at length. She admits that till Wednesday, the police did not approach her. She says that she was shocked on learning about death of Khatubai but denies that because of the shock, she gave statement involving the accused. It also transpires from her deposition that the deceased had earlier complained of the appellant ill-treating her.

8.2 If dying declaration (Exh.19) is seen, that also reveals that on 31st October, 1992, when the pot was broken by Khatubai, her husband and in-laws were annoyed and intimidated her. At about 5.00 p.m., they set her to fire by pouring kerosene on her. She says that she was admitted to hospital by her brothers-in-law on 1st November, 1992.

8.3 What emerges from these pieces of evidence is that the say of the deceased is consistent that she was ill-treated and that on the day of the incident, the appellant put her to fire after pouring kerosene. The evidence is consistent and clearly implicates the appellant. There are no reasons to doubt the evidence of Bai Ameena who states that the deceased gave an oral dying declaration. Her version gets support from subsequently recorded F.I.R. and the dying declaration before the Executive Magistrate.

9. Much has been argued about the dying declaration. The contention regarding the dying declaration being not recorded by the Executive Magistrate in the words of the deceased, prima facie, appears to be quite attractive but it cannot be overlooked that 'Kachchhi' is not a full-fledged language but it is only a spoken language and has no script of its own. That language is a localised language and not widely known or understood by people. The local people are used to speaking in 'Kachchhi' as well as Gujarati. The recording of dying declaration by the Executive Magistrate by translating the same from 'Kachchhi' to Gujarati cannot be doubted as incorrect translation considering the evidence on record. There has been no challenge to his ability to translate. There was no reason to translate the same wrongly to implicate the appellant. There is no material, not even a

suggestion, to read any motive or animus against the appellant that the Executive Magistrate may have which may have led him to do so. Therefore, in our opinion, the dying declaration before the Executive Magistrate cannot be thrown out on this ground.

9.1 So far as timing aspects are concerned, the doctor has said that she examined the patient for 15-20 minutes when she was approached by the Executive Magistrate at 1535 hours. That is exactly the time when the dying declaration is claimed to have been recorded. This can be a clear mistake or even an attempt to exaggerate with a view to add authenticity and truthfulness to the certificate issued by the doctor about the health status of the deceased and capacity to give dying declaration. This discrepancy is so minor that it may not shake the evidence of independent witnesses like the Executive Magistrate or the doctor. If harmoniously read, this would only indicate a mistake on the part of the doctor when she stated in cross-examination that she examined the patient for 15-20 minutes.

9.2 Having examined the evidence in the form of dying declaration from various perspectives as discussed above, we are of the view that the dying declaration before the Executive Magistrate does merit acceptance as has been done by the Trial Court. There are no defects which can be branded as fatal to the evidence.

10. About the place of incident, it was contended that as per the F.I.R., the deceased was fetching water in the shop whereas the panchnama of the place of incident would indicate that the place where the incident occurred had a bed, a bathing place, a cooking place etc. and, therefore, the place of incident was a house rather than a shop. We are not able to accept this contention for the reason that we notice that the place of incident consists of a big room, the external side of which contains various equipments and gadgets required for the work of blacksmith. There is another part of the premise which contains a bed, bathing place and cooking place etc. This appears to be a case where the place of work and place of residence are common. In small villages, this is not an uncommon phenomenon and, therefore, it cannot be said that a serious doubt is created about the place of incident.

11. We find that the dying declaration itself speaks that the deceased was taken to hospital on 1st November, 1992 by her brother-in-law. We also find that no action seems to have been taken for registering the offence as it was filed for the first time on 3rd November, 1992 when the police was informed. This means that neither the husband or in-laws of the deceased nor the hospital personnel cared to intimate the police immediately when the deceased was admitted on 01st November, 1992 though it was a case of burns may be accidental or otherwise. It is only on 3rd November, 1992 that the police is

intimated and the Taluka Police Station Diary Entry No.136 of 1992 is recorded at 1435 hours stating that the police Jamadar Mahetabsinh Gulabsinh gave intimation that Khatubai is brought to hospital after she sustained burns on 31st October, 1992 at 6.30 p.m. at her residence while she was preparing tea. This entry has been exhibited upon an endorsement of the learned advocate for defence that the same may be admitted to evidence under Section 294 of CrPC. Neither Mahetabsinh Gulabsinh nor the person making the entry has been examined. It does not come on record as to who gave this information to Mahetabsinh.

11.1 It has come in evidence that the deceased was brought to hospital on 1st November, 1992 by her brothers-in-law. It has also come on record that Bai Ameena came to hospital on 3rd November, 1992 on learning that the deceased is brought to hospital. Till then, neither the police nor the relatives of the deceased were informed by the accused side. It appears, therefore, that on Bai Ameena going to the hospital, somebody informed the police stationed at the hospital who, in turn, intimated the Bhuj Taluka Police Station on the basis of which the station diary entry is made. Unfortunately, neither the person stationed at the hospital nor the person making the entry has been examined by the prosecution and there has been no probe on this aspect by the defence. In our opinion, the Trial Court was justified in not giving much significance to this

station diary entry in absence of such material as to who gave the intimation about accidental burns to the police and in absence of any challenge thereto. The Trial Court was justified in not giving more weightage to the station diary entry than the weightage given to the dying declaration and the F.I.R. The station diary entry cannot outweigh the evidential value of a dying declaration recorded by an independent officer like the Executive Magistrate.

12. Having given due consideration to all the contentions raised before us and having examined the record and proceedings, we find that the Trial Court was justified in recording conviction. No error can be said to have been committed by the Trial Court in doing so. We do not find any merit in the contentions raised on behalf of the appellant. The appeal, therefore, must fail and stands dismissed. The judgment and order dated 28th August, 1997 rendered by learned Additional Sessions Judge, Kachchh at Bhuj in Sessions Case No.15 of 1993 stands confirmed.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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